Supreme Court, U.S.
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No. 92-942

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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KENNETH ROBERT AMES and
LILLIAN MAY AMES,
Petitioners

v.

SUNDANCE STATE BANK,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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BRIEF OF SUNDANCE STATE BANK IN OPPOSITION

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January 8, 1993

QUESTIONS PRESENTED

1. Considering the seeming mandatory language of 11 U.S.C. §§502(c) and 553, must a Bankruptcy Court, in a case commenced under Chapter 12 of Title 11, estimate a Debtor's alleged setoff to a valid secured creditor's claim?

2. Considering 11 U.S.C. §§1225(a)(5)(B) and 1222(b)(7) and (8), must a Bankruptcy Court confirm a reorganization plan filed in a case commenced under Chapter 12 of Title 11 that provides for the transfer of a secured creditor's claim to different collateral over the creditor's objection as to reasonableness of the substitution?

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STATEMENT OF THE CASE

Respondent, Sundance State Bank, hereafter referred to as The Bank, held the operating loan for the Petitioners' farming operations. The Bank had an undisputed secured interest in the Petitioners' livestock, equipment and machinery as collateral for the loan. The Debtors, Kenneth Robert Ames and Lillian May Ames, filed a petition for Chapter 12 bankruptcy relief on February 23, 1990. Dispute exists as to the status of the note when the Debtors chose to file for bankruptcy protection. This was done prior to normal annual communication regarding the Petitioners' financial situation with The Bank. The loan had backed up to the point renewal was unlikely, but the note was not called prior to the bankruptcy filing.

Petitioners filed their first Plan of Reorganization on February 26, 1990, but were immediately aware it required revisions after the creditors' meeting. An Amended Plan was filed on May 22, 1990, which contemplated, and

heavily relied upon for feasibility an as yet unfiled adversary proceeding against the Respondent for breach of loan commitment. The Court found that the Plan was not feasible because the proposed lawsuit was of insufficient real value for reorganization purposes as of that time.

A "Second Amended Plan of Reorganization" was filed on September 5, 1990. The Plan would have forced The Bank to accept being substituted a second interest lien on real estate for its original security of livestock, equipment and machinery. Respondent objected to the substitution because of the slowed real estate market in Wyoming at that time and argued that its claim had increased as a result of accruing interest and attorney's fees. The Bankruptcy Court once again denied confirmation for lack of feasibility, lifted the Automatic Stay and dismissed the case. *In re Ames*, 973 F.2d 849 (10th Cir. 1992) The Petitioners are appealing those decisions.

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SUMMARY OF ARGUMENT

Pursuant to 11 U.S.C. §502(c), a Bankruptcy Court shall estimate a secured creditor's claim against a Bankruptcy estate that is disputed by the Debtor. The Petitioners suggest it is an abuse of discretion and is a basis for reversal of the Court's decision for a Bankruptcy Court to refuse to estimate a contingent claim yet unfiled cause of action as a potential setoff of a secured creditor.

Although a substitution of collateral may be made in a Reorganization Plan, it is not an abuse of discretion for a Bankruptcy Court to determine that a substitution of certain collateral may make it impossible or very burdensome for the secured creditor to sell the collateral and obtain some compensation for his status as a secured creditor, and thus deny confirmation of a Plan of Reorganization for lack of feasibility.

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ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

A. It is not an abuse of discretion for a Bankruptcy Court to refuse to estimate a contingent counterclaim against a secured creditor for purposes of setting off an allowed proof of claim.

There is no question that §502(c) of the United States Bankruptcy Code gives the Bankruptcy Court a duty to estimate contingent claims against the Debtor's estate in order to avoid unnecessary delay in case administration. However, Petitioners confuse this issue with the difference between a potential lawsuit in the nature of a setoff or counterclaim and a "claim" against the Debtor's estate. A Bankruptcy Court does not have a duty to value all potential, theoretical offsets which may never materialize. To suggest that it does would clothe a Debtor with a powerful tool to abuse any assertion.

Note the difference between estimating an unsecured claim in a setoff, none of the creditors which will receive a significant percentage distribution, and "estimating"

complex counterclaims in commercial litigation. It is not an abuse of a Bankruptcy Court's discretion to refuse to determine the value of a contemplated lawsuit. Because the Bankruptcy Judge found that the potential lawsuit in this case, which was not even filed in a court anywhere at the time, would probably not materialize within the time frame of the Chapter 12 proceeding and therefore not benefit the Debtors in any way during the proceeding, the Court exercised its discretion and refused to put a value on the lawsuit against The Bank, which the Petitioners had contemplated for purposes of setoff.

The Court's refusal to value the lawsuit caused the Plan to be unfeasible since it relied entirely on the contemplated wrongful liability suit against the Respondent, Sundance State Bank. After three tries at producing a confirmable Plan, the Court dismissed the case.

The decisions made by the Bankruptcy Court were totally within its discretion and should

not be reversed unless it is found that the Court was clearly erroneous in its findings. A de novo review of the case is appropriate in this situation. This Court should not substitute its interpretations of the application of the law for that of the Bankruptcy Court if any applicable law supports the Bankruptcy Court's actions. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-574 (1985).

B. It is not an abuse of discretion for a Bankruptcy Court to deny confirmation of a Chapter 12 Plan that provides for an unreasonable substitution of collateral.

It is true that substituting collateral for short periods of time is occasionally commercially reasonable and sometimes allowed in Bankruptcy proceedings. However, it is totally within the discretion of the Bankruptcy Court to determine that a substitution of collateral over a long period of time should not be allowed in a Chapter 12 Bankruptcy proceeding.

Counsel for The Bank objected to the use of its collateral until such time as The Bank's entire claim was paid. While, as the Petitioners suggest, land is a "reduced risk collateral not prone to disease, predators, bad weather," it is not as easily liquidated as would be a herd of cattle.

The Bankruptcy Court based its decision to disallow the substitution of a second interest in land for the original collateral of cattle and equipment on the fact that at the time of the decision, land in Wyoming was not easily liquidated. If the Court had allowed the substitution, it would have imposed an undue burden on or prejudice against the Respondent. Further, Sundance State Bank is not a long-term lender and had no plans to make a thirty year loan, especially one secured by a second mortgage.

The Debtors crossed over bounds of commercial reasonableness with this proposal. They proposed to pay a higher interest rate loan

with a lower interest rate creditor's collateral. The Debtors' effort here was to take an 11.5% creditor's currently due-in-full note, stretch it to a thirty (30) year payout, and pay down an eight percent (8%) creditor's loan thirty (30) year obligation with the 11.5% creditor's collateral. This plan does not make good business sense, nor is it the most profitable use of the cash collateral.

The Petitioners look to Chapter 13 Bankruptcy provisions and argue that other Courts have allowed substitution of collateral. They further argue that payouts of "any property" of value are appropriate. While the provisions of Chapter 13 Bankruptcy and the provisions of Chapter 12 bankruptcy are somewhat similar, Chapter 13 precedent holds very little weight here. U.S.C. §1222(a)(9) does not give authority for a Chapter 12 Plan to extend secured creditor payouts over a longer period of time than five years, although it may be reasonable for a brief period of time.

The Bankruptcy Court properly exercised its discretion in protecting a secured creditor's claim and right to receive payment for that claim based on the current market, the nature of the creditor's business and the burden such a substitution would place on the creditor when finding that the Petitioners' Chapter 12 Plan was not feasible.

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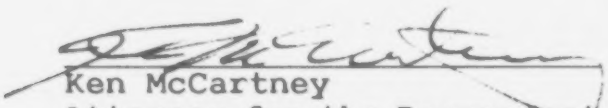
CONCLUSION

Petitioners fail to show that the Bankruptcy Court abused its discretion in refusing to estimate the value of the possible lawsuit against The Bank for purposes of setoff and for determining that the Plan of Reorganization presented to the Court was not feasible for substitution of collateral. Neither issue on the facts this case presents is compelling enough to merit this Court's involvement.

For the reasons stated above, Respondent,

Sundance State Bank, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,



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Date: January 8, 1992